

97-8660
No. ~~Breard v. ...~~

IN THE SUPREME COURT
OF THE UNITED STATES
October 1997 Term

APR 10

IN RE ANGEL FRANCISCO BREARD

Petitioner.

PETITION FOR A WRIT OF HABEAS CORPUS

Imminent Execution Scheduled
April 14, 1998

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292P

CAPITAL CASE

QUESTION PRESENTED

1. Whether, under the United States Constitution's Supremacy Clause, this Court should enforce a determination by the International Court of Justice that the rights of the Republic of Paraguay under Article 36 of the Vienna Convention on Consular Relations may have been violated in connection with the prosecution and sentencing to death of Angel Francisco Breard and that the life of Mr. Breard should be preserved until such time as these issues have been adjudicated.

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To: The Honorable Justices of the Said Court:

Petitioner, ANGEL FRANCISCO BREARD, by counsel, represents unto the Court that Petitioner is illegally held, under sentence of death, in the custody, confinement and restraint of the Warden and his agents and employees at the Greensville Correctional Center of the Virginia Department of Corrections, located in Greensville County, Commonwealth of Virginia, and that his confinement under sentence of death is illegal for the reasons set forth below.

JURISDICTION

Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 2241, and 2254.

LAW INVOLVED

The Supremacy Clause of the United States Constitution, article VI, clause 2, provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every States shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 provides, in relevant part:

Article 36

Communication and contact with nationals of the sending state

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state:

(a) consular offices shall be free to communicate with nationals of the sending state and to have access to them. Nationals of the sending state shall have the same freedom with respect to communication with and access to consular officers of the sending state;

(b) if he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

• • •

2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

PRIOR PROCEEDINGS

The judgment of conviction and sentence under attack were entered and imposed by the Circuit Court of Arlington County, the Honorable Paul F. Sheridan presiding.

On September 1, 1992, Petitioner was arrested for the February 17, 1992 murder of Ruth Dickie. On October 19, 1992, Petitioner was indicted for attempted rape and for the capital offense of murder in the commission or of subsequent to rape of attempted rape. On June 21, 1993, he was arraigned and pled not guilty to these charges. Petitioner was tried on the above named charges on June 21 through June 25, 1993. He was represented at trial by court-appointed counsel, Richard J. McCue and Robert L. Tomlinson, II.

On June 24, 1993, the jury returned a verdict of guilty on the charges, and fixed Petitioner's punishment on the attempted rape conviction at confinement in the penitentiary for ten (10) years and a fine of \$100,000. On June 25, 1993, after hearing evidence related to sentencing, the jury sentenced Petitioner to death for the capital murder. On August 22, 1993, after the preparation of a post-

sentencing report, the trial court conducted a sentencing hearing, and after considering the presentence report, the evidence in the case, and allocution of counsel, the trial court entered an order in accordance with the verdict of the jury rendered on June 24 and 25, 1993. Petitioner was represented on direct appeal to the Supreme Court of Virginia by the same court-appointed trial counsel. The Supreme Court of Virginia affirmed the judgment of the trial court on June 10, 1994. Breard v. Commonwealth, 248 Va. 68 (1994). A petition for a writ of certiorari was denied by the United States Supreme Court on October 31, 1994. Breard v. Commonwealth, 115 S. Ct. 442 (1994). Counsel for Petitioner on the Petition for a Writ of Certiorari were Lawrence S. Robbins and Donald M. Falk.

Petitioner was represented in his state habeas proceedings by Carl Womack. His petition for a writ of habeas corpus subjiciendum was denied by the Circuit Court of Arlington County on June 29, 1995. Breard v. Angelone, Order of June 29, 1995. Meanwhile, on that same day, Petitioner had also filed a *pro se* motion to amend that petition, adding a claim of ineffectiveness of counsel based on trial counsel's ineffective presentation of his claim that he committed the murder because he was under a satanic curse. The Supreme Court of Virginia refused Petitioner's petition for appeal of the habeas corpus decision on January 17, 1996, and denied his petition for rehearing on March 1, 1996. Breard v. Angelone, Orders of January 17, 1996 and March 1, 1996.

Petitioner filed his first federal habeas corpus petition on August 30, 1996, in the United States District Court for the Eastern District of Virginia, based in part upon Virginia's violation of the Vienna Convention on Consular Relations (the "Vienna Convention" or the "treaty") in connection with his case. He has been represented throughout his federal court habeas proceedings by attorneys of the law firm McGuire, Woods, Battle & Boothe LLP.

Two weeks after Petitioner's first petition was filed, the Republic of Paraguay, its Ambassador to the United States and its Consul-General filed a federal complaint (denoted hereafter as the Paraguay suit) based upon the same facts as Breard's Vienna Convention claim, seeking declaratory and injunctive relief against several officials of the Commonwealth of Virginia to vindicate rights conferred upon Paraguay and the Consul-General by the Vienna Convention.

The District Court dismissed both cases. Breard v. Netherland, 949 F. Supp. 1255 (E.D. Va. 1996); Republic of Paraguay v. Allen, 949 F. Supp. 1269 (E.D. Va. 1996). The Fourth Circuit Court of Appeals affirmed the District Court's dismissal of both cases, Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998); Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998).

The Circuit Court for Arlington County thereafter set April 14, 1998, as the date for Breard's execution. App. 81.

The plaintiffs in the Paraguay suit filed a Petition for Certiorari in the Court on February 24, 1998. Republic of Paraguay v. Gilmore, No. 97-1390. On March 22, 1998 they filed an Application for Stay of or Injunction Against Execution pending Disposition of Petition for Certiorari. On March 11, 1998, Petitioner filed a Petition for a Writ of Certiorari in the Court. Breard v. Greene, No. 97-8214. Both Petitions for Certiorari and Applications for Stay are still pending in the Court. The Court, by Order dated April 8, 1998, invited the Solicitor General to present the views of the United States on both the Breard and Paraguay cases by 5:00 p.m. on April 13, 1998.

On April 3, 1998, pursuant to article 1 of the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations, the Republic of Paraguay filed in the International Court of Justice (the "ICJ") an Application and a Request for Interim Measures of Protection in a case concerning the proceedings brought against Angel Francisco Breard:

Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America). App. 83-95.

The interim measures of protection sought by Paraguay included: (1) that the Government of the United States take the measures necessary to ensure that Petitioner not be executed pending the disposition of the case in the ICJ, and (2) that the Government of the United States ensure that no action is taken that might prejudice the rights of the Republic of Paraguay with respect to any decision the ICJ may render on the merits of the case. After hearing oral argument on April 7, 1998, the ICJ entered a unanimous order on April 9, 1998 indicating that:

The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order.

App. 103. In a concurring declaration, the ICJ's President Stephen M. Schwebel, of the United States, stated:

It is of obvious importance to the maintenance and development of a rule of law among states that the obligations imposed by treaties be complied with and that, where they are not, reparation be required. The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States). In my view, these considerations outweigh the serious difficulties which this Order imposes on the authorities of the United States and Virginia.

App. 107.

Simultaneously with the filing of this Petition for a Writ of Habeas Corpus, Petitioner is filing an Application for Stay of Execution. Petitioner asks the Court to stay his scheduled execution to

afford the ICJ the opportunity to consider the Application filed by Paraguay in a thoughtful manner and without the pressure of an imminent execution date.

FACTUAL BACKGROUND

A. Introduction

Petitioner Angel Francisco Breard is a Paraguayan citizen currently on Death Row in Virginia's Greensville Correctional Center. He seeks federal habeas corpus relief. The authorities of the Commonwealth of Virginia have stipulated that Mr. Breard was not advised of his rights to consular notification and access under Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (the "Vienna Convention" or the "Convention" or the "treaty") prior to being tried and sentenced to death in Arlington County, Virginia in 1993. Cert. Pet. App. 180-81. The treaty explicitly required that he be so advised. As a treaty, entered into by the President of the United States with the advice and consent of the Senate, the Convention is the "supreme law of the land." U.S. Const. art. VI, cl.2.

It appears that violating the requirements of Article 36 of the Vienna Convention is the norm, not only in Virginia¹, but throughout the United States.² In fact, various high state officials have publicly questioned the applicability and the binding effect of the Convention with respect to the criminal law enforcement activities of the states. Frank Green, a reporter for the Richmond Times-Dispatch, wrote an article in the September 17, 1997 edition concerning the murder conviction of

¹Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D. Va. 1996) ("Virginia's persistent refusal to abide by the Vienna Convention troubles the Court."), *aff'd sub nom. Breard v. Pruett*, 136 F.3d 615, (4th Cir. 1998), *petition for cert. filed*, (March 11, 1998)(No. 97-8214.) Murphy v. Netherland, CA No. 3:95CV856, slip op. at 6-8 (E.D. Va. July 26, 1996)("The Court does not condone what appears to be Virginia's defiant and continuing disregard for the Vienna Convention."), Cert. Pet. App. 43-45, *aff'd*, 116 F.3d 97 (4th Cir.), *cert. denied*, 118 S. Ct. 26 (1997).

²*See, e.g., United Mexican States v. Woods*, 126 F.3d 1220 (9th Cir. 1997) (Arizona), *petition for cert. filed*, (U.S. Feb.24, 1998)(No. 97-1390); Faulder v. Johnson, 81 F.3d 515 (5th Cir. 1996) (Texas).

Mexican Mario Murphy, that Virginia's former Governor, George F. Allen, "disputed whether it was Virginia's responsibility to notify Murphy a foreigner on death row of his Vienna Convention right." Appendix to Petition for Writ of Certiorari submitted by Petitioner in Angel Francisco Breard v. Fred W. Greene, Warden, No. 97-8214 ("Cert. Pet. App.") 293-95. In that same case, the state prosecutor who oversaw the legal proceedings against Murphy was reported by The Virginian-Pilot & Ledger Star of Norfolk to have described an assertion of rights under Article 36 as "completely ridiculous" and to question whether such rights were enforceable: "I mean, what is the remedy? I suppose Mexico could declare war on us." Cert. Pet. App. 296-98. The General Counsel to Texas Governor George W. Bush reportedly protested a request by the U.S. Department of State for information concerning possible violations of Article 36 by Texas law enforcement officials on the ground that "the State of Texas is not a signatory to the Vienna Convention." Al Kamen, Virtually Blushing, The Washington Post, June 23, 1997, at A17. Cert. Pet. App. 299-301. The Executive Director of the Association of Retired Police Chiefs in Washington, D.C. is reported to have stated about foreigners' Vienna Convention rights that "[i]n my 47 years in law enforcement, I have never seen anything from the State Department or FBI about this." Margaret A. Jacobs, Some Convictions of Foreigners in U.S. Stir Debate Over Rights, The Wall Street Journal, Nov. 4, 1997, at B5. Cert. Pet. App. 302-03.

Mr. Breard is one of approximately 60 foreign nationals on America's death rows who apparently were convicted and sentenced to death in violation of the Convention. The Supreme Court has an obligation to ensure that states comply with federal and international law, particularly when the rights of foreigners and foreign nations are involved. The Federalist, No. 80 (Alexander Hamilton)(Masters, Smith & Co. ed. 1852).

The Vienna Convention is of great significance, not only to foreign nationals detained in the United States, but also to United States citizens traveling abroad who depend on the observance of their rights under the Convention by other nations.³ The treaty functions as a "cultural bridge" and bestows on foreign nationals rights comparable to those accorded all persons pursuant to this Court's opinions in Gideon v. Wainwright, 372 U.S. 335 (1963), and Miranda v. Arizona, 384 U.S. 436 (1966). Indeed, our State Department, speaking on behalf of American citizens, has described one of the rights provided by Article 36 of the Vienna Convention as follows:

... the host government *must notify the arrestee without delay of the arrestee's right to communicate with the American consul.*

[This] provides an opportunity for the consular officer to explain the legal and judicial procedures of the host government . . . *at a time when such information is most useful.*

United States Department of State, 7 Foreign Affairs Manual ¶¶ 411.1, 412 ("Chapter 400") (emphasis added). Cert. Pet. App. 280-81.

In the courts below, with respect to Mr. Breard's first federal habeas petition, the judicially created doctrine of procedural default has been allowed to override the treaty obligations and thereby cause those courts to sanctify admittedly outrageous treaty violations by the states. To make matters worse, Paraguay's action brought to vindicate its rights in the Breard matter has been dismissed below on Eleventh Amendment grounds. Hence, the grand sounding rights extended to foreign states and

³Figures available from the International Trade Administration, Tourism Industries, show over 50 million trips abroad annually by United States residents in recent years. See Abstract of International Travel, Tourism Industries, International Trade Administration, http://tinet.ita.doc.gov/abst_ at 5-7. Cert. Pet. App. 285-92.

their citizens, as well as the solemn duties imposed upon each of the United States, have proven to be illusory.

B. Breard, His Crime and Trial

Angel Francisco Breard was born in Argentina, his father's native land, in 1966. In 1978 his family moved to his mother's family's home in Paraguay, and Mr. Breard later adopted Paraguayan citizenship. In 1986, at the age of 20, he came to the United States. Cert. Pet. App. 112, ¶ 23. He married in 1987, but the marriage lasted less than six months. Cert. Pet. App. 110, ¶ 17. In 1992, depressed and drunk, Mr. Breard committed a murder in the course of an attempted rape.

Mr. Breard was arrested on September 1, 1992 and charged with capital murder and attempted rape. Cert. Pet. App. 107, ¶ 4. Virginia has stipulated that he was not, at the time of his arrest or at any time thereafter, informed by Virginia or local authorities of his right pursuant to Article 36 of the Vienna Convention to contact the Paraguayan and/or the Argentine consulates for assistance in his defense. Cert. Pet. App. 180-81. He did not become aware of that right until his direct appeal and state habeas corpus proceedings had been concluded.

Prior to trial, the Commonwealth "made it clear to [Breard's attorneys] that the Commonwealth would forego the death penalty if Mr. Breard would plead guilty." Affidavit of trial counsel, Cert. Pet. App. 195, ¶ 5.⁴ Trial counsel had "investigated the Commonwealth's evidence against Mr. Breard and satisfied [themselves] that the prosecution would be able to prove Breard's guilt beyond a reasonable doubt." *Id.*, Cert. Pet. App. 194-95, ¶ 4. Nevertheless, against the advice of his counsel, Mr. Breard refused the offer of a life sentence and pled not guilty. Unfamiliar with

⁴This affidavit was procured by the Commonwealth and introduced by it against Breard in his state habeas proceeding.

the law and culture of the United States, he had decided instead "to testify and admit his guilt" to the jury in the hope that the jury would set him free upon learning that a satanic curse, now lifted, had been responsible for the crime. *Id.*, Cert. Pet. App. 199, ¶ 16, and attached memorandum, Cert. Pet. App. 202.01-02.

The Commonwealth's case against Mr. Breard was based entirely on DNA. The prosecution introduced no incriminating statements. After the prosecution rested, Mr. Breard took the stand in order to confess his crime to the jury. He testified that a satanic curse had been placed upon him by his former father-in-law, that the curse had caused him to commit the murder, and that the curse had been lifted upon his finding Jesus Christ after his arrest.

On direct examination, he described the curse and his release from it as follows:

A. What I was going through is full of thought that came to my mind and keep coming to my mind and more than that, that I know now, is that everything is a spiritual thing, it's -- it's a warfare, it's a bitter warfare, it's something that you can't see, you can't touch it, but it's there. You feel it and it's powerful.

Q. What was causing these thoughts to your --

A. Was causing?

Q. Yes.

A. Well, I believe deeply everything was causing all that, it is Satanic practice against myself.

Q. And who initiated this Satanic practice against you?

A. My father-in-law.

All I was doing is seeking for myself, destruction for myself. In doing so I kill someone else.

Q. [N]ow, is this curse still affecting you?

A. No.

Q. Why not?

A. It was very simple, because now I found Jesus, I just have him in my heart and my life, so now I'm free of all that. And in a way there is many things that I learned, and I learned speaking to him here in jail. And one thing that he said, if you keep my commandments you shall know the truth, and the truth shall make you free. If you keep my commandments you'll be truly my disciple.

So that does not affect me any more.

Q. Is there anything also about what happened that night that you want this jury to know?

A. Well, one important thing is that I never ever thought -- intend to kill her or to kill anyone. No, I did it as the fact. I did it, but I -- no, that's the best way I can explain to you. How it happened. I didn't want to do it, but it happened.

Cert. Pet. App. 215-22.

The Arlington County jury, predictably, did not set him free. He was convicted on all charges. After finding Mr. Breard guilty, the jury heard evidence pertinent to sentencing.

The jury deliberated for approximately 6½ hours on the question of penalty. During its deliberations, the jury twice sent out notes to the judge asking questions that showed its struggle with the decision between life imprisonment and death. The first question was, "with life in prison how long will he be there before he is eligible for parole?" Cert. Pet. App. 228. The trial judge instructed the jury that he could not answer the question and the jury should not concern itself with the possibility of parole. In colloquy with trial counsel, the Court observed, "it seems bizarre that we as

a Commonwealth entrust jurors with a decision like this and won't tell them the reality of what their choices are." Id.

The second question was whether the jury can "recommend the sentence of life without the possibility of parole." Id., Cert. Pet. App. 229. In response, the Court instructed the jury that it must limit itself to the three choices previously outlined in the instructions: death, life imprisonment, or life imprisonment plus a fine. Ultimately, the jury fixed the sentence at death, and, on August 20, 1993, the trial judge held a sentencing hearing and imposed the death sentence. Cert. Pet. App. 232-35.

In sum, throughout the trial proceedings, due to his lack of understanding, Mr. Breard forced his American court-appointed attorneys to take a number of steps, against their advice, which were contrary to his best interest. For example:

(a) Mr. Breard refused the proffered plea agreement in which the Commonwealth would seek only a life sentence if he would plead guilty, id., Cert. Pet. App. 195, ¶ 5;

(b) Mr. Breard insisted upon testifying on his own behalf, confessing his guilt, and explaining the events of February 17, 1992 as the only eyewitness to them, id.;

(c) Mr. Breard urged his attorneys not to call mitigation witnesses. They refused his directive on that occasion, id., Cert. Pet. App. 197, ¶ 9;

(d) Mr. Breard refused to permit his family members to be called as witnesses at the post-trial hearing on a motion to set aside the death penalty, id.;

(e) Mr. Breard refused to permit his attorneys to renew a pretrial motion to declare unconstitutional Virginia's method at that time of carrying out the death sentence, *id.*⁵

Never during the entirety of the proceedings against him was Mr. Breard informed of his right to contact the consulates of Paraguay and/or Argentina. Nor were those consulates informed of the detention and trial of their citizen or the imposition of the death sentence upon him, despite the Commonwealth's knowledge that Mr. Breard was a foreigner. Cert. Pet. App. 180-81. As this Court is well aware, since becoming aware of his plight (from sources other than American federal or state authorities), both Paraguay and Argentina have made every effort to assist Mr. Breard and have made clear that they would have done so sooner had they known of his arrest, detention and trial.

REASONS FOR GRANTING THE WRIT

A. The International Court of Justice Has Entered a Unanimous Order Indicating that Breard's Execution Should Be Stayed.

This Court has recently reconfirmed its original jurisdiction over writs of habeas corpus. *Felker v. Turpin*, 116 S. Ct. 2333, 2337-39 (1996). Breard respectfully submits this Petition for Habeas Corpus pursuant to the Court's original jurisdiction so that the United States through its appropriate political instrumentalities or the courts may consider how the United States will comply with the ICJ's Order of April 9, 1998 and any future orders from the ICJ. A spokesman for the Governor of Virginia implied that the Governor may not accede to the Order of the ICJ. In an article in the April 7, 1998 edition of the *Virginian-Pilot*, Laura LaFay reports as follows:

⁵A similar motion had been made in a Loudoun County, Virginia, case, supported by extensive expert evidence, and the prosecution dropped the capital murder charge there to moot that motion. Cert. Pet. App. 130-31, ¶¶ 72, 73. In Mr. Breard's case, a similar pre-trial effort was made, but the trial judge ruled that the motion was premature and denied it with leave to renew it if Breard were convicted and given the death penalty. Preliminary Hearing, Cert. Pet. App. 205-14.

Gov. Jim Gilmore is unlikely to heed the order of any foreign court, his spokesman, Mark Miner, said Monday. "This was a heinous murder that occurred in Virginia, and the Governor will abide by the rulings of the courts in the United States," said Miner.

App. 110.

The ICJ is one of the principal organs of the United Nations. *See* U.N. Charter, art. 92. The International Court is equal, within the United Nations structure, to the Security Council and the General Assembly. *Id.* All member states of the United Nations are subject to the provisions of the Statute of the International Court of Justice. *See* Statute of the International Court of Justice, 59 Stat. 1055 (entered into force Oct. 24, 1945). Article 41 of the Statute of the ICJ authorizes the Court to "indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." *See id.*

There is a dispute among commentators as to whether, given the wording of Article 41, provisional measures decided upon by the ICJ are binding upon the parties. *Compare* Jerome B. Elkind, Interim Protection, A Functional Approach 155, 156 (1981) *with* Hambro, The Binding Character of the Provisional Measures of Protection Indicated by the ICJ, "Rechtsfragen Der Internationales Organization. Festschrift Für Hans Wehberg, 152-171 (1956). The ICJ has not ruled as to whether an indication of provisional measures is binding on the parties. Restatement (Third) of Foreign Relations Law of the United States § 902 cmt. (1987).

However, the preferred view among commentators is that the member states of the United Nations have "undertake[n] to comply with the decision[s] of the International Court of Justice," including provisional measures, pursuant to Article 94(1) of the United Nations Charter. *See, e.g.,* Shabtai Rosenne, The International Court of Justice: An Essay in Political and Legal Theory 82

(1957); Shabtai Rosenne, The Law and Practice of the International Court, 125 (1965); Jerzy Sztucki, Interim Measures in the Hague Court: An Attempt at a Scrutiny, 285 (1982). Accordingly, the ICJ's April 9, 1998 decision is binding upon the United States and should be enforced by this court. Marbury v. Madison, 5 U.S. 137 (1803) (It is "emphatically the province and duty of the judicial department to say what the law is.").

Once it became aware of Mr. Breard's plight, Paraguay moved quickly to assert its rights in the courts of the United States, and then in the ICJ. Paraguay wished to permit the courts of the United States to have the first opportunity to determine the merits of its case, Paraguay's Cert. Pet. at 28. The execution date was required by Virginia statute to be set within a period of sixty days after a hearing that had to be held within ten days after the Virginia Attorney General or Commonwealth's Attorney reported to the state trial court that the Fourth Circuit Court of Appeals had affirmed the dismissal of Mr. Breard's habeas corpus petition. Va. Code Ann. § 53.1-232.1. The Court of Appeals' decisions affirming dismissal of Mr. Breard's habeas petition and Paraguay's lawsuit were issued simultaneously, on January 22, 1998, and Mr. Breard's Petition for Rehearing in the Fourth Circuit was denied on February 18, 1998. After engaging in unsuccessful negotiations with the United States in an effort to resolve the matter. See introductory remarks by Ambassador Cáceres during the public sitting held on April 7, 1998 before the ICJ. App. 116.

The Court should grant a stay of execution in this matter in order to show ICJ the respect it is due as the judicial arm of the United Nations, by preventing the Commonwealth of Virginia from taking an action that would render nugatory any decision by that Court with respect to the enforceability of an international treaty that, by virtue of the Supremacy Clause,⁶ is the supreme law

⁶U. S. Const., art. VI, cl. 2.

of the United States. It should then be prepared, through habeas corpus or otherwise, to enforce a possible order from the ICJ requiring a new trial for Mr. Breard. It is this Court's duty "to enforce the . . . treaties of the United States, whatever they might be, and . . . [the Vienna Convention] remains the supreme law of the land." Air France v. Saks, 470 U.S. 392, 406 (1985) (re: Warsaw Convention), quoting Reed v. Wiser, 555 F.2d 1079, 1093 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977).

B. The Rights to Consular Notification and Access Provided by the Vienna Convention Are of International Importance

When a foreign national of a signatory nation to the Vienna Convention on Consular Relations is arrested in another signatory nation, the Convention requires the latter to notify the arrested person of his right to contact his consulate. Article 36 of the Vienna Convention provides, in pertinent part:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state:

- (a) consular officers shall be free to communicate with nationals of the sending state and to have access to them. Nationals of the sending state shall have the same freedom with respect to communications with and access to consular officers of the sending state;
- (b) if he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving state, subject to the

proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 590 U.N.T.S. 261.

The Convention was ratified with the advice and consent of the United States Senate in 1969, and is, thus, one of the laws of the United States. Statements of the United States Department of State repeatedly emphasize that Article 36 confers on the arrested or detained person the right to be informed of his right to consular notification. *See* Memorial of the United States to the International Court of Justice in the Case Concerning United States Diplomatic and Consular Staff in Tehran filed in response to the 1979 storming of the American Embassy ("Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others").

To reinforce the Convention's obligations, the United States State Department regularly sends notices to governors, state attorneys general, and mayors of cities having a population in excess of 100,000 advising them of their duties under the Vienna Convention and the importance of complying with its terms. Cert. Pet. App. 236-37. Of particular import with respect to Mr. Breard's September 1992 arrest, the State Department sent such notices in August 1991 and October 1992. Cert. Pet. App. 238-73.

The State Department also instructs United States consulates in other nations that the Vienna Convention requires that "the host government must notify the arrestee without delay of the arrestee's right to communicate with the American consul." Chapter 400, ¶ 411.1, Cert. Pet. App. 280. According to the State Department, immediate access allows the consular official to act as a "cultural bridge" between the arrested person and the arresting state at the time of the arrestee's

greatest need to understand his rights under the foreign government's system of laws, the legal and judicial procedures facing him, and the local cultural norms. *See id.* Cert. Pet. App. 280-81, ¶¶ 401, 412. The State Department notes that "no one needs that cultural bridge more than the [individual] . . . who has been arrested in a foreign country. . . ." *Id.*

Moreover, as Judge Butzner wrote in his concurring opinion in the Court of Appeals in Breard v. Pruett, 134 F.3d at 622:

The protections afforded by the Vienna Convention go far beyond Breard's case. United States citizens are scattered around the world -- as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that "international law is founded upon mutuality and reciprocity" Hilton v. Guyot, 159 U.S. 113, 228 (1895).

. . . The importance of the Vienna Convention cannot be overstated. It should be honored by all nations that have signed the treaty and all states of this nation.

While Virginia asserts an interest in the finality of its criminal convictions, under settled principles, domestic law must be construed and applied in such a manner as to permit full effect to be given to the will of the political branches of the federal government clearly expressed in a treaty of the United States. *See, e.g., Hartford Fire Ins. Co. v. Merrett Underwriting Agency Management Ltd.*, 509 U.S. 764, 814-15 (1993) (domestic law must be construed so as to be consistent with the United States' international law obligations unless no other construction is possible). State concerns are entitled to no deference when they conflict with a treaty, as to which the federal government's control is exclusive. *See, e.g., Kolovrat v. Oregon*, 366 U.S. 187, 198 (1961) (treaty overrides state

laws regulating the descent and distribution of estates); United States v. Pink, 315 U.S. 203, 231 (1942) ("the power of a State to refuse enforcement of rights [based on State policy considerations] . . . must give way before the superior Federal policy evidenced by a treaty or International compact or agreement"); Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941) ("[w]hen the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land"); Missouri v. Holland, 252 U.S. 416, 433-35 (1920) (treaty and federal statute protecting migratory birds override state's power to act in that area); Restatement (3rd) of the Foreign Relations Law of the United States § 115 cmt e.

In agreeing to the Vienna Convention, the United States approved language that expressly exempts Article 36 rights from the operation of any country's laws that would prevent full effect from being given to the purposes for which Article 36 exists.⁷ The United States entered no reservation with respect to that language. *Cf.* Restatement (3rd) of the Foreign Relations Law of the United States § 314 (describing ability of nations to enter reservations with respect to treaty provisions). Paragraph 2 of Article 36 provides:

The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso, however, that *the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.*

Emphasis added.

⁷The Convention is self-executing. Beard v. Pruett, 134 F.3d at 622, (Butzner, J. concurring); Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996); United States v. Calderon-Medina, 591 F.2d 529 (9th Cir. 1979); Sen. Exec. Rep. No. 9, 91st Cong., 1st Sess., Cert. Pet. App. at 5 (1969) (statement of U.S. State Department Deputy Legal Adviser noting that the United States regards the Vienna Convention to be "entirely self-executing").

While the Commonwealth asserts its interest in the finality of its criminal judgments, no signatory country can so burden the exercise of the arrestee's rights under Article 36 of the Vienna Convention that the "purposes" of the right are compromised or lost. Significantly, during the drafting of Article 36(2), the Soviet Union offered an amendment which would have permitted domestic law to impair the rights accorded in Article 36(1) so long as they did not render them nugatory. In support of the USSR's proposed amendment, Mr. Khlestov stated that, as drafted (and ultimately adopted), Article 36(1) could "force states . . . to alter their criminal laws and regulations and allow consuls to interfere with normal legal procedures in order to protect alien offenders" U.N. GAOR, Conference on Consular Relations, 12th plen. mtg., agenda item 10, ¶¶2-9, U.N. Doc. A/CONF. 25/SR.12, 17 April 1963. at 1, *represented in* 1 Off. Rec. 40; *see id.* The foregoing analysis by the U.S.S.R. spokesman was correct. That was the whole idea.

If the courts of the United States continue to disregard Virginia's "defiant and continuing disregard for the Vienna Convention," even in the face of an ICJ order indicating that the Government of the United States should take measures to preserve the life of Angel Breard until the ICJ has had an opportunity to review the merits of Paraguay's case, the federal judiciary will strip away the fundamental protections provided by the Vienna Convention in this country. The effect would be to invite similar behavior by other signatories. *See Butzner, J., concurring in Breard v. Pruett*, 134 F.3d at 622. The United States' interest in protecting these rights was brought home by the lawlessness and barbarism of those who overran the American Embassy in Tehran, Iran in 1979. Taking 52 American diplomats and civilians hostage, Iran deprived them of all access to the outside world for 444 days. The United States reacted with outrage and pressed its case before the International Court of Justice, where it proclaimed to the world that "the channel of communication between consular

officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations." Memorial of the United States to the International Court of Justice in the Case Concerning United States Diplomatic and Consular Staff in Tehran filed in response to the 1979 storming of the American Embassy.

In an earlier incident, the United States protested Syria's 1975 arrest of two American citizens and its failure to notify the American Embassy. Ronan Doherty, Foreign Affairs v. Federalism, 82 Va. L. Rev., 1281, 1318 n.165 (1996), citing Luke T. Lee, Consular Law and Practice 145 (2d ed. 1991). In a telegram to the Syrian authorities, the United States felt it necessary to remind them that the Vienna Convention was a solemn treaty obligation, and stated that "[t]he Government of the Syrian Arab Republic can be confident that if its nationals were detained in the United States the appropriate Syrian officials would be promptly notified and allowed prompt access to those nationals." *Id.*, quoting Department of State Telegram 40298 to Embassy Damascus, Feb. 21, 1975. As matters have developed, however, any such Syrian confidence would have been misplaced.

Notwithstanding the great weight attached by the federal government to the Vienna Convention and to the personal rights guaranteed by its provisions, the individual states have long ignored legal obligations imposed upon them by the Convention.⁸ As this Court has previously

⁸The District Court expressly found in Mr. Breard's case that Virginia has engaged in a "persistent refusal to abide by the Vienna Convention." Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D. Va. 1996). In Murphy v. Netherland, C.A. No. 3:95CV856, slip op. (E.D. Va. July 26, 1996), in which a Mexican national raised claims under the Vienna Convention, the same District Court Judge found that Virginia has demonstrated a "defiant and continuing disregard for the Vienna Convention." *Id.* at 7. Cert. Pet. App. 44. Moreover, as noted above, while considering Mr. Murphy's then-pending clemency petition, the then-Governor of Virginia is said to have "disputed whether it was Virginia's responsibility to notify Murphy of his Vienna Convention right." Cert. Pet. App. 293-95. This sort of misconception at the highest level of state government must be remedied, and can be remedied only if this Court takes action to make clear to the states that it is imperative for state officials to understand and abide by the obligations imposed by the Vienna Convention.

In that same news article, the Legal Adviser to the State Department is quoted as saying that the State Department

stated, "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." Hines v. Davidowitz, 312 U.S. at 64.

CONCLUSION

Over 200 years ago, James Madison spoke for the American people when he wrote, "Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit." The Federalist, No. 51 at 241 (Masters, Smith & Co. ed. 1852). For foreign nationals such as Breard, justice demands a fair trial with the assistance of his consul and a fair appeal. Virginia and other states have engaged in a long-term pattern of misconduct that has resulted in the denial of the Vienna Convention rights of numerous foreigners and their respective nations. The ICJ has decided to review the merits of Paraguay's case relating to the violation of its rights under the Convention.

This Court should grant Mr. Breard's Petition for a Writ of Habeas Corpus and his Application for Stay of Execution to afford the ICJ the opportunity to determine the merits of Paraguay's claim against the United States in a deliberate and considered manner, without the looming deadline of or the risk of having its ultimate decision thwarted by, an execution scheduled for less than one week from the date when the ICJ indicated its intention to hear the merits of the case, and to afford this Court the opportunity to determine how the United States should respond to the decision rendered by the ICJ.

would "convey to the Embassy of Mexico on behalf of the government of the United States, our deepest regrets over the apparent failure to provide Mr. Murphy with consular notification." Such offers to make post-execution expressions of regret cannot be the hallmark of American justice, particularly when the ultimate event requiring that regrets be tendered had not yet occurred and was made inevitable only by the inaction of the United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Petition for a Writ of Certiorari was hand delivered to Donald R. Curry, Esquire, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, this 10 day of April, 1998.

William G. Broadus